

FEDERAL COURT OF AUSTRALIA

Chao v Minister for Immigration and Border Protection [2018] FCA 858

Appeal from: *Chao v Minister for Immigration & Anor* [2017] FCCA 2449

File number: NSD 2063 of 2017

Judge: **ALLSOP CJ**

Date of judgment: 8 June 2018

Catchwords: **MIGRATION** – the Tribunal was not satisfied that the appellant and sponsor were in a de facto relationship – whether legal unreasonableness – evident and intelligent justification – danger of adopting rigid definitional formulae – significance of relationship certificate – family violence provisions – whether Tribunal’s conclusion was open to it on the evidence provided

Legislation: *Migration Act 1958* (Cth), ss 5CB, 65
Migration Regulations 1994 (Cth), rr 1.23(9)(b)(i), 2.03A, Sch 2
Relationships Register Act 2010 (NSW), ss 5, 6, 7

Cases cited: *Lee v Minister for Immigration and Multicultural and Indigenous Affairs* [2005] FCA 464
Minister for Immigration and Border Protection v Singh [2014] FCAFC 1; 231 FCR 437
Minister for Immigration and Border Protection v Stretton [2016] FCAFC 11; 237 FCR 1
Minister for Immigration and Citizenship v Li [2013] HCA 18; 249 CLR 332
NAJD of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs [2002] FCA 1088

Date of hearing: 23 April 2018

Registry: New South Wales

Division: General Division

National Practice Area: Administrative and Constitutional Law and Human Rights

Category: Catchwords

Number of paragraphs: 33

Solicitor for the Appellant: Mr R Turner of Turner Coulson Immigration Lawyers

Solicitor for the First Respondent: Mr D Watson of Australian Government Solicitor

ORDERS

NSD 2063 of 2017

BETWEEN: CHAO

Appellant

**AND: MINISTER FOR IMMIGRATION AND BORDER
PROTECTION**

First Respondent

ADMINISTRATIVE APPEALS TRIBUNAL

Second Respondent

JUDGE: ALLSOP CJ

DATE OF ORDER: 8 JUNE 2018

THE COURT ORDERS THAT:

1. 1. The appeal be dismissed with costs.

Note: Entry of orders is dealt with in Rule 39.32 of the *Federal Court Rules 2011*.

REASONS FOR JUDGMENT

ALLSOP CJ:

1 This appeal against the orders of the Federal Circuit Court of Australia dismissing an application for review of a decision of the Administrative Appeals Tribunal is in relation to a refusal to grant the appellant, Mr Chao, a partner visa under s 65 of the *Migration Act 1958* (Cth) (**the Act**).

2 On 22 February 2013, the appellant lodged an application for a partner visa on the basis that he was in a de facto relationship with Ms Chen, his sponsor. He applied for two visas: the Partner (Temporary) (Class UK) (Subclass 820) visa and Partner (Residence) (Class BS) (Subclass 801) visa.

3 The relationship between Mr Chao and Ms Chen appears to have broken down in late 2013. On 28 January 2014 and 27 February 2014, the Minister's Department received letters from Ms Chen stating that she was no longer in a relationship with the appellant and her sponsorship should be withdrawn. On 15 April 2014, the Department invited Mr Chao to provide further information if he wished to continue with the application. No further information was provided.

4 On 20 June 2014, the Minister's delegate refused to grant a partner visa. Noting the lack of evidence as to the existence of a genuine and continuing relationship or joint living arrangements, and the sponsor's indication that the relationship had ceased, the delegate was not satisfied that Mr Chao was the de facto partner of Ms Chen. He therefore did not meet clause 820.221(1)(a) of Sch 2 to the *Migration Regulations 1994* (Cth) and was refused the Subclass 820 visa. In turn, in not being a person who held a Subclass 820 partner visa, he did not meet clause 801.221, and did not satisfy the criteria for a Subclass 801 partner visa.

5 On 10 July 2014, Mr Chao sought review of the delegate's decision before the Tribunal. At those proceedings, Mr Chao accepted that his relationship with Ms Chen had concluded. He claimed that he had suffered family violence perpetrated by Ms Chen.

6 On 9 March 2016, the Tribunal affirmed the decision of the delegate. The issue for determination before the Tribunal was whether Mr Chao was, *at the time of the application*

(February 2013), the de facto partner of Ms Chen for the purposes of s 5CB of the Act. The Tribunal was not satisfied that the parties were at that time in a de facto relationship.

Mr Chao sought judicial review of the Tribunal's decision. The Federal Circuit Court of Australia dismissed this application for review.

Before the primary judge, the appellant had one ground of appeal: that the Tribunal failed to carry out its statutory duty by failing to give genuine and realistic consideration to the evidence of the appellant's de facto relationship at the time of the visa application and failing to act reasonably.

Before this Court, the one ground of appeal was that the Federal Circuit Court applied the wrong test when looking at the alleged legal unreasonableness of the Tribunal's decision. The Notice of Appeal filed 23 November 2017 stated that the Federal Circuit Court had applied the test as a need to demonstrate that "the Tribunal formed a view that no reasonable decision maker could have arrived at on the same evidence" when it ought to have looked at whether the Tribunal's reasons "provided an evident and intelligent justification for the decision".

Section 5CB of the Act was relevantly in the following terms:

De facto partners

(1) For the purposes of this Act, a person is the de facto partner of another person (whether of the same sex or a different sex) if, under subsection (2), the person is in a de facto relationship with the other person.

De facto relationship

(2) For the purposes of subsection (1), a person is in a de facto relationship with another person if they are not in a married relationship (for the purposes of section 5F) with each other but:

(a) they have a mutual commitment to a shared life to the exclusion of all others; and

(b) the relationship between them is genuine and continuing; and

(c) they:

(i) live together; or

(ii) do not live separately and apart on a permanent basis; and

(d) they are not related by family (see subsection (4)).

(3) The regulations may make provision in relation to the determination of whether

one or more of the conditions in paragraphs (2)(a), (b), (c) and (d) exist. The regulations may make different provision in relation to the determination for different purposes whether one or more of those conditions exist.

Definition

(4) For the purposes of paragraph (2)(d), 2 persons are related by family if:

- (a) one is the child (including an adopted child) of the other; or
- (b) one is another descendant of the other (even if the relationship between them is traced through an adoptive parent); or
- (c) they have a parent in common (who may be an adoptive parent of either or both of them).

For this purpose, disregard whether an adoption is declared void or has ceased to have effect.

11 11 The Tribunal had to be satisfied that Mr Chao and Ms Chen were de facto partners. The state of satisfaction of a decision-maker must not reflect legal unreasonableness in the decision-making process or conclusion.

12 12 The appellant's submissions focused upon the words "evident and intelligent justification", used in *Minister for Immigration and Citizenship v Li* [2013] HCA 18; 249 CLR 332 as constituting the entirety of the test for legal unreasonableness. That is not correct. As noted by the Full Court in *Minister for Immigration and Border Protection v Singh* [2014] FCAFC 1; 231 FCR 437 at [44], the judgments in *Li* identified two species of legal unreasonableness. The first is where there is an underlying jurisdictional error in the decision-making process. The second is outcome-focused, where there is no specific jurisdictional error identified, but the conclusion come to by the Tribunal is said to be legally unreasonable.

13 13 As was stated in *Stretton* at [10], the reasoning in cases such as *Li* should be read as a whole and:

...as a discussion of the sources and lineage of the concept: [64]-[65], of the limits of the concept of reasonableness given the supervisory role of the courts: [66], of the fundamental necessity to look to the scope and purpose of the statute conferring the power to find its limits: [67], of the various ways the concept has been described: [68]-[71], of the relationship between unreasonableness derived from specific error and unreasonableness from illogical or irrational reasoning: [72], of the place of proportionality or disproportion in the evaluation: [73]-[74] (as to which see also French CJ at [30] and see also *McCloy v New South Wales* (2015) 89 ALJR 857; 325 ALR 15 at [3] (French CJ, Kiefel, Bell and Keane JJ)), of the guidance capable of being obtained from recognising the close analogy between judicial review of administrative action and appellate review of judicial discretion: [75]-[76].

14 14 The content of the concept of legal unreasonableness has been discussed in cases such as *Minister for Immigration and Citizenship v Li* [2013] HCA 18; 249 CLR 332; *Minister for Immigration and Border Protection v Stretton* [2016] FCAFC 11; 237 FCR 1; and *Singh*. What is clear is that legal unreasonableness and jurisdictional error do not depend on strict and rigid definitional formulae, or “one verbal description rather than another”: *Stretton* at [2]. These concepts are about the lawful exercise of power. They must be considered holistically.

15 15 As I put to counsel for the appellant during oral submissions, the precise expression of the test is not really the point. Trying to say that one way of wording the test is defective (such as “the Tribunal form[ing] a view that no reasonable decision maker could have arrived at on the same evidence”) and another way is correct (such as the Tribunal “provid[ing] an evident and intelligent justification for the decision”) is not the correct approach. It merely acts to fragment the content of the concept of legal unreasonableness into what can become artificial and meaningless nomenclature. Such an approach encourages a form of review of legal reasonableness that is incompatible with the invariably fact-dependent nature of the Tribunal’s evaluative process in reaching a state of satisfaction or lack thereof as to the particular applicant’s claims.

16 16 It is important at this point to reiterate that the Court’s task in judicial review is a limited one. This limited role necessarily feeds into the content of the concept of legal unreasonableness. As was emphasised in *Stretton*:

8. The concept does not provide a vehicle for the Court to remake the decision according to its view as to reasonableness (by implication thereby finding a contrary view unreasonable). Parliament has conferred the power on the decision-maker. The Court’s function is a supervisory one as to legality: see *Li* at [30], [66] and [105].

...

12. ... the task for the Court is not to assess what it thinks is reasonable and thereby conclude (as if in an appeal concerning breach of duty of care) that any other view displays error; rather, the task is to evaluate the quality of the decision, by reference to the statutory source of the power and thus, from its scope, purpose and objects to assess whether it is lawful.

17 17 Turning to the submissions made before this Court, counsel for the appellant raised two main pieces of evidence that they claimed the Tribunal had not given due weight. The first was the significance of Mr Chao and Ms Chen’s relationship being registered under New

South Wales law. The second was the statutory declarations by third parties in respect of the relationship between Mr Chao and Ms Chen.

18 18 In respect of the first issue, it was not disputed that the appellant and sponsor had registered their relationship in New South Wales under the *Relationships Register Act 2010* (NSW). In written submissions, the appellant claimed that relationship certificate “is a declaration to the world of a de-facto relationship in the same way as a Marriage Certificate is in relation to a Marriage” and that the Tribunal’s reasoning led to a conclusion that “no Relationship Certificates is evidence of a relationship”. This is not accurate. Registration under the State Act is not akin to marriage. To register one’s relationship is a self-assertion that a relationship exists. The Tribunal accepted that the appellant and sponsor were in a relationship. However, the question before it was not whether any intimate relationship existed; rather, it was whether a de facto relationship of the kind required for this partner visa existed.

19 19 Under s 5CB(2) of the Act, a couple in a de facto relationship must show that they have a mutual commitment to a shared life together to the exclusion of all others, that the relationship is genuine and continuing, and that they live together or at least do not live separately on a permanent basis. Where applying for a Partner (Provisional) (Class UF) visa or (as the appellant did in this case) a Partner (Temporary) (Class UK) visa, the Regulations impose the additional requirement that the “Minister must be satisfied that the applicant has been in the de facto relationship for at least the period of 12 months ending immediately before the date of the application”: r 2.03A(3) of the Regulations. Some exceptions apply to this time requirement. One such exception to that is where a relationship is registered under relevant State law. In those circumstances, the 12 month requirement is deemed to be satisfied: r 2.03A(5) of the Regulations.

20 20 Section 5 of the *Relationships Register Act 2010* (NSW) concerns eligibility. Parties seeking to register must provide a statutory declaration of their relationship, as well as evidence of their identity and any other information requested by the Registrar: *Relationships Register Act*, ss 6 and 7. The *Relationships Register Regulations* may also prescribe further documents or information that must be provided, although they currently do not do so: *Relationships Register Act*, s 6(d).

21 21 The registration of a relationship is not treated by the New South Wales legislation as equivalent to a de facto relationship. In and of itself, registration satisfies only one of the

many factors required for a de facto relationship under s 5CB of the Act. In upholding the Tribunal decision, the primary judge similarly recognised that the relationship certificate was necessary not because it showed a de facto relationship existed, but because it overcame the need to establish a relationship of at least 12 months' duration.

22 22 Thus, although a registered relationship may be indicative of a de facto relationship, it is not determinative of a de facto relationship. In this case, the Tribunal considered the relationship certificate in context with the other claims and material before it. The Tribunal was satisfied that the pair had been in a relationship, but was not satisfied that it was a de facto relationship at the relevant time. This conclusion was open to it on the evidence. No jurisdictional error is disclosed in the Tribunal's reasons and conclusion, nor in the reasons and conclusion of the primary judge.

23 23 Secondly, counsel for the appellant raised the statutory declarations submitted with Mr Chao's partner visa application. These were statutory declarations by third parties attesting to the existence of the relationship between Mr Chao and Ms Chen, in support of their visa application. At [31] of its reasons, the Tribunal stated that statutory declarations were general in nature, and did not give evidence about the nature of the relationship. Counsel for the appellant alleged that implicit in the Tribunal's comments was a dismissal of the probative value of the evidence.

24 24 At the hearing, I acknowledged that the Tribunal had adopted a fairly prosaic and matter-of-fact manner in reciting the evidence in the statutory declarations. Yet I also noted that there was no doubt that the Tribunal had read and considered the declarations. I asked counsel for the appellant how it was put that the evidence had not been properly addressed. Counsel noted that while there was no express finding of whether the declarations were accepted or rejected, the dismissive comments of the Tribunal logically implied that they are been wrongly rejected.

25 25 I am not persuaded by this argument for two reasons. First, the Tribunal did not find that the appellant and sponsor were not in a genuine relationship. The question was whether the Tribunal was satisfied that the relationship was of a particular kind. The Tribunal was not satisfied that it was a de facto relationship within the meaning of s 5CB of the Act. That definition is an evaluative one and no single factor in and of itself necessitates a finding that a de facto relationship exists. Secondly, the Tribunal's reasons must be read as a whole. The

Tribunal clearly read and considered the statutory declarations and came to the conclusion that the contents did not warrant the conclusion or the state of the satisfaction.

26 26 The primary judge explained at [16] of his reasons that these statutory declarations:

... were necessary for the partner visa application because Mr Chao had previously been refused a student visa. They were not, however, sufficient in themselves to necessarily establish a de facto relationship and the content of them needed to be considered by the Tribunal in order to satisfy itself that Mr Chao had been in a genuine de facto relationship with his former sponsor at the time of the visa application.

27 27 Given the above, there is no error or legal unreasonableness in the reasoning or conclusion of the Tribunal or primary judge on this point. The appellant's contentions express disagreement with the Tribunal's findings but do not disclose any jurisdictional error.

28 28 Counsel for the appellant then raised a final submission: that the Tribunal fell into error by failing to have any regard to the evidence of the non-judicially determined claim of family violence by Ms Chen against the appellant, Mr Chao. The family violence claim was relevant because in circumstances where the applicant and sponsor's relationship breaks down after the application for a visa is made, the applicant can still be considered for the visa if he or she can show that they or members of their family unit have been the victim of family violence committed by their sponsor: Division 1.5 of the Regulations. In this case, the relationship did break down. Proving that family violence occurred during the relationship could mean that the appellant was still potentially eligible for a visa. However, this is only so if the relationship itself was found to be a de facto relationship at the relevant time: r 1.23(9)(b)(i) of the Regulations.

29 29 Contrary to what was implied in both the written and oral submissions of the appellant, evidence of violence in the relationship does not establish the existence (then or at any earlier point in time) of a de facto relationship. Depending upon its nature, evidence of domestic violence may indicate that a relationship existed, but it does not go towards showing that the relationship was a de facto one under s 5CB of the Act, in particular at any given time.

30 30 At [38] of its reasons, the Tribunal noted that it had considered Mr Chao's claimed family violence, and the other evidence, but was not satisfied that the preliminary

requirement of a de facto relationship was met. As such, it was not required to consider the family violence claims any further.

31 31 The primary judge was correct to conclude at [30] of its reasons on this issue that although “[r]easonable minds might differ as to the approach taken by the Tribunal, in particular its decision to find that the parties were not in a de facto relationship at the time of application, rather than to assume that they were and to deal with the evidence of family violence”, no jurisdictional error is disclosed.

32 32 Given all of the above, it cannot be concluded that the Tribunal in this case failed to consider the claims and evidence provided, or that it failed to “confront and balance” the countervailing factors presented: see *Stretton* at [101] per Wigney J. The Tribunal did not make assertions or conclusion without a grounding in the evidence, and did not fail to consider any evidence that it was required to consider. There is no evident legal unreasonableness in the Tribunal’s reasons or conclusion as to a lack of relevant satisfaction. The Tribunal made a judgment which was open to it on the strength and weaknesses of the evidence and claims presented. As recognised by French J (as he then was) in *Lee v Minister for Immigration & Multicultural & Indigenous Affairs* [2005] FCA 464, [16], “whether or not one agrees with the conclusion drawn, there is no error of law, apparent from the Tribunal’s reasons” and the appellant’s challenge to that conclusion in these proceedings amounts to more of a challenge on the merits than of any jurisdictional error.

33 33 The appeal should be dismissed with costs.

I certify that the preceding thirty-three (33) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Chief Justice Allsop.

Associate:

Dated: 8 June 2018